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No. 84-1593

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BRUNSWICK CORPORATION,
Petitioner,

v.

RIEGEL TEXTILE CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner's prefatory explanation of the questions it seeks to present does not disclose that the record shows that its fraud claims were known to it well before the statutory limitations period, that petitioner is not a competitor of respondent in the relevant market, and that the Patent Interference Board had, at best, only ancillary jurisdiction over its untimely claims of fraud.

Respondent submits that the questions presented are as follows:

1. Whether this Court should review a decision of the United States Court of Appeals for the Seventh Circuit declining to hold that the antitrust statute of limitations was equitably tolled by the pendency of a patent interference before a tribunal which had no regulatory function, had at best ancillary jurisdiction over only one of the issues presented by this antitrust action, and rejected that issue as not timely raised.

2. Whether this Court should review such a decision holding, in accordance with settled principles, that defending entitlement to an allegedly invalid patent in an interference proceeding does not constitute a continuing violation of the antitrust laws.

3. Whether this Court should review such a decision applying settled principles to hold that the frustration of a rival claimant's alleged entitlement to a patent is not an injury redressable under the antitrust laws.

STATEMENT REQUIRED BY RULE 28.1

Respondent Riegel Textile Corporation has no parent corporation and no subsidiaries other than wholly-owned subsidiaries.

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BRIEF IN OPPOSITION

Respondent Riegel Textile Corporation ("Riegel") respectfully submits that the petition raises no issue that warrants review. No undecided significant question is presented, no direct conflict among the Circuits exists, and the rulings below resolve the issues in accordance with the controlling principles of this Court's decisions.

STATEMENT OF FACTS

The petition omits some critical facts and obscures others. The following statement is accordingly submitted.

Petitioner ("Brunswick"), a manufacturer of metal fibers, alleges that in 1967 it invented a method of blending metal and textile fibers to form antistatic yarn. (Pet. App. at A-4-5) Because it is not a textile manufacturer, Brunswick then approached Riegel and allegedly taught

Riegel its secret process. *Id.* According to Brunswick, Riegel applied for (in 1970) and obtained (in 1972) a patent covering that very process. *Id.*

In February of 1973, Brunswick, aware of both the process it had allegedly taught Riegel and of the process claims of Riegel's patent, informed Riegel that it questioned the propriety of Riegel's patent. (A-41) Riegel's response to Brunswick then, as now, was that Riegel's patent validly covers its own invention.

Brunswick in 1973 copied the claims of Riegel's patent into its own 1970 patent application, and an interference was declared to decide the statutory question of priority of invention. (A-5) Although allegations of fraud in the procurement of a patent were within the Interference Board's ancillary jurisdiction, Brunswick did not raise such claims during the period for presentation of ancillary issues.

In March 1982, Brunswick sued Riegel in the Circuit Court of Cook County, alleging its present fraud and "piracy" claims under various state-law theories. (A-16; 7th Cir. J. App. at 192) Brunswick brought this antitrust action in July 1982.

In November 1983, the Board issued its final ruling, finding that Brunswick was not entitled to a patent on the process at issue because its application failed to disclose the blending method claimed, and that its fraud claims were untimely because it had not raised them when required despite actual knowledge of their alleged basis before the proceeding began.[1]

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[1] Brunswick claims by affidavit that it first raised its claims of fraudulent patent procurement in 1978, more than four years after Brunswick had learned of Riegel's patent and the process it covered. (A-59-60) Riegel believes that the discovery brief comments referred to in Brunswick's affidavit were inadequate, and that the issue was not raised until considerably later.

> The evidence which Klein [Brunswick] relies upon for his fraud allegation was known to him prior to the declaration of this interference due to joint efforts on the part of Brunswick and Riegel to develop a suitable antistatic fabric for hospital uniforms. Thus, if Klein wanted to raise the ancillary issue of fraud, he could and should have raised it during the motion period. Since the question of fraud was not timely raised, we decline to consider it at this stage of the proceeding.

(A-84)

Neither the complaint nor any subsequent argument has suggested that Brunswick is a competitor in the textile market. While Brunswick refers to itself as a "competitor," it has alleged and argued only that Riegel's allegedly unlawful procurement and defense of its patent have prevented Brunswick from obtaining its own patent on the process, causing Brunswick to lose royalties it would have collected from patent licensing, to incur costs in asserting its claims to a patent in the interference, and to forego metal fiber sales it supposedly would have made to the textile manufacturers who would license its patent. (A-49; 7th Cir. Reply Brief at 21)

The District Court dismissed the complaint as barred by the Clayton Act's four-year statute of limitations, and as failing to show any act by Riegel amounting to enforcement of its patent against Brunswick, or anyone else. (A-22)

On appeal, Brunswick argued only that the statute had been tolled and that its alleged loss of a patent was an injury justifying treble antitrust damages. The Seventh Circuit held both that the statute of limitations barred Brunswick's claims and that its alleged patent loss was not a competitive injury under the antitrust laws. (A-4)

REASONS FOR DENYING THE WRIT

Brunswick's only real attempt to address the standards for review under Rule 19 is its claim that the Seventh Circuit's rejection of equitable tolling under the circumstances of this case created a conflict among the circuits and raised an issue of significance for future litigants. This argument has no merit. Brunswick's remaining arguments amount to no more than assertions that the judgment below was erroneous.

I. BRUNSWICK'S STATUTE OF LIMITATIONS ARGUMENTS ARE NEITHER SIGNIFICANT NOR MERITORIOUS

A. The Seventh Circuit's Equitable Tolling Ruling Neither Causes a Conflict Among the Circuits Nor Presents An Issue of Precedential Importance.

The complaint established that Brunswick was on full notice of the basis for its fraudulent procurement allegations not later than February 1973, almost ten years before it filed this action, and affirmatively alleged that Brunswick was aware of such claims in October 1977, well outside the limitations period in this case. (A-37, 41)

Brunswick nevertheless urges that the opinion below created a conflict among the circuits by declining to invoke the doctrine of equitable tolling under *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394 (9th Cir.), *cert. denied*, 449 U.S. 831 (1980). However, both of the courts below soundly distinguished *Mt. Hood* from the instant case.

Mt. Hood held that the statute of limitations for an antitrust claim was tolled by proceedings involving essentially the same claim before the Interstate Commerce Commission, the agency charged by Congress with regulating competition in furtherance of a national transportation policy. The Ninth Circuit concluded that resolution of regulatory policy matters, a task outside conven-

tional judicial experience, was essential to a determination of the threshold issue of antitrust immunity for conduct approved by the Commission's regulatory actions. 616 F.2d at 397-98. Accordingly, the court held that the ICC had primary jurisdiction, making resort to that body a prerequisite to the maintenance of an antitrust action. *Id.* at 398. This, coupled with the notice provided by timely presentation of "essentially the same contested issues as . . . the later antitrust suit" to the ICC within the limitations period, justified a holding that the statute should be equitably tolled. *Id.* at 401, 405.

Here, Brunswick contends that the patent interference proceeding should have tolled the statute of limitations for an antitrust claim involving allegations of fraudulent patent procurement under *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). However, questions of alleged fraudulent procurement were, at best, only within the *ancillary* jurisdiction of the Interference Board, *Hilborn v. Dann*, 546 F.2d 401, 403 (C.C.P.A. 1976), and Brunswick's attempt to invoke the doctrine of primary jurisdiction in this antitrust action is without merit.[2]

The expertise possessed by the Patent and Trademark Office does not give it primary jurisdiction over cases arising *solely* under the *patent laws*. 28 U.S.C. § 1338(a); *Johnson & Johnson, Inc. v. Wallace A. Erickson & Co.*, 627 F.2d 57 (7th Cir. 1980); *RCA Corp. v. Applied Digital Data Systems, Inc.*, 467 F. Supp. 99 (D. Del.

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[2] Brunswick seems to argue at least in part that it is the technical question of priority of invention under 35 U.S.C. § 135, rather than its allegations of fraudulent procurement, that should serve as the basis for invoking the doctrine of primary jurisdiction and tolling the statute of limitations. However, there is no nexus at all between the technical question of priority and an antitrust claim under *Walker Process*, because this Court was careful to point out that patent invalidity on grounds other than deliberate fraud could not serve as the basis for an antitrust claim. 382 U.S. at 177.

1979). *A fortiori*, the same holds true in *antitrust* cases. Neither patent questions nor fraud issues are outside the conventional experience of judges, and as *Walker Process* itself demonstrates, determination of patent invalidity on fraudulent procurement grounds is a proper matter for judicial determination in the first instance. 382 U.S. at 176.[3]

Moreover, unlike the ICC, the Board of Patent Interferences is not a regulatory agency charged with accommodating competitive concerns and national regulatory policy, but rather an administrative tribunal applying conventional adjudicatory techniques to evidentiary and legal questions. When Congress has not entrusted the accommodation of competitive considerations and a public interest calling for pervasive regulation to the wisdom and experience of a regulatory agency, "[t]he justification for primary jurisdiction accordingly disappears." *United States v. Radio Corp. of America*, 358 U.S. 334, 350 (1959). *See* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22:6 (2d ed. 1983).

Further, as Brunswick recognizes (Pet. at 13), while an allegation of fraudulent patent procurement is an ele-

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[3] It is unquestioned that district courts have, and should exercise in proper cases, the discretionary power to stay their own proceedings in light of litigation pending before other courts or tribunals. *See, e.g., Research Corp. v. Radio Corp. of America*, 181 F. Supp. 709 (D. Del. 1960). This inherent equitable power, however, is a far cry from the jurisdictional *disability* imposed by the primary jurisdiction doctrine. The short *per curiam* opinion in *Deltec, Inc. v. Laster*, 326 F.2d 443 (6th Cir. 1964), is argued to be inconsistent with the otherwise uniform precedent. However, *Deltec* addressed an attempt to bring a patent antitrust claim *before a patent had even been issued* to the defendant. Since the basis for the essential fraudulent procurement and patent enforcement elements of such a claim had not yet (and might not ever) come into existence, the Sixth Circuit's conclusion that the claim was premature is unsurprising. In any event, *Deltec* does not purport to invoke either primary jurisdiction or equitable tolling, and has not been followed once in the 20 years since its rendition.

ment of a *Walker Process* antitrust claim, *see* 382 U.S. at 176, it is only one element, not the essential presentation of the antitrust case itself on which the court relied to justify equitable suspension of the limitations bar in *Mt. Hood.*[4] Moreover, even if the notice requirement of *Mt. Hood* were otherwise met, *Mt. Hood* is hardly authority for suggesting that the statute should be tolled by a proceeding in which the claims that form the only basis for invoking the doctrine *were rejected because they were not timely raised.* (A-84) Under these circumstances, the Seventh Circuit's distinction of *Mt. Hood* was manifestly sound, and does not create a conflict between the circuits.

Finally, Brunswick's argument that its primary jurisdiction contentions are important for precedential purposes is misplaced. In the first place, its attempted leap from ancillary to primary jurisdiction and then to equitable tolling is without serious merit, and its argument that adding another layer of litigation to antitrust cases would decrease the overall adjudicatory burden belies common sense and experience.[5] Moreover, the Patent Law

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[4] Brunswick argues that there is "no reason" to require that an antitrust claim be brought if an essential element of that claim is pending before the Interference Board. (Pet. at 11-12) However, the reason for such a requirement is that fundamental fairness and the policy of the statute of limitations require at least notice of a claim within the limitations period. Notice (even belated notice) of an attack on patent validity in a proceeding limited to the technical question of priority of invention is not notice of a charge of anticompetitive conduct and alleged antitrust injury.

[5] Under Brunswick's reasoning, persons genuinely injured under the antitrust laws would be forced to wait while interference proceedings wound their way through the Board's processes (8 years in this case), followed by district court proceedings under 35 U.S.C. § 146, appeal to the Federal Circuit, and *certiorari* proceedings in this Court—all of which might be devoted exclusively or substantially to technical patent questions wholly unrelated to any antitrust issue, and with no guarantee that ancillary claims would even be reached—before relief under the antitrust laws could be sought. Additionally, Brunswick's judicial economy arguments ring some-

Amendments Act of 1984 has replaced the Board of Interferences and expanded the jurisdictional reach of the new tribunal, thus mooting any claimed precedential significance that Brunswick's arguments otherwise might have had. Pub. L. 98-622, 98th Cong., 2d Sess., 10B U.S. Code Cong. & Admin. News 5827 at 5836-37 (December 1984).

B. The Courts Below Did Not Err in Declining to Find a Continuing Antitrust Violation.

Without suggesting why consideration of its excuses for failing to make a timely claim would be an appropriate exercise of this Court's jurisdiction, Brunswick characterizes Riegel's defense of its patent in the interference proceeding as based on continuing fraudulent claims of invention, concludes that this shows "continuing exclusionary conduct," and asserts that the courts below should have found a continuing antitrust violation. (Pet. at 14) The facts alleged by Brunswick, however, show that there has been no exclusionary conduct within the limitations period.

In *Walker Process, supra*, this Court held that:

> "We have concluded that the *enforcement* of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present. In such event the treble damage provisions of § 4 of the Clayton Act would be available to an injured party."

382 U.S. at 172, 174 (emphasis added).

The "enforcement" requirement of *Walker Process* clearly means that a plaintiff must do more than allege

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what hollow under the circumstances of this case, where it filed its antitrust claim *during* the interference proceeding, and is seeking to maintain antitrust, patent, and state-law claims against Riegel simultaneously in three different courts. (A-16)

that a patent has been procured by fraud in order to state an antitrust claim—he must point to some invocation of the patent's potential power to exclude competitors from the relevant market.[6]

The only conduct by Riegel within the limitations period alleged by Brunswick is Riegel's defense of the interference, a proceeding whose only purpose was to decide priority of invention and which could not itself have resulted in the exclusion of anyone from the market. The only attempted factual intent given by Brunswick to its claims of "continued exclusion" is its argument that Riegel's defense of its position in the interference proceeding has "excluded" Brunswick from supplanting Riegel as the owner of a patent on the process at issue. That argument has nothing to do with any conduct in the relevant textile market, and clearly does not show the "enforcement" contemplated by *Walker Process.*

If it is the continued existence of Riegel's patent that Brunswick complains of, the statute of limitations would bar its claim even if patent existence alone could amount to the enforcement required by *Walker Process.* When Riegel's patent issued in 1972, its attributes included a 17-year statutory existence and the legal consequence that no one else could have a patent covering the same claims.

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[6] The lower courts have logically and consistently interpreted *Walker Process* as requiring a showing of *enforcement—i.e.,* some invocation of the patent's potential exclusionary power—as an essential element of an antitrust claim involving the alleged fraudulent procurement of a patent. *See, e.g., Indium Corp. of America v. Semi-Alloys, Inc.,* 591 F. Supp. 608 (N.D.N.Y. 1984); *Minnesota Mining & Mfg. Co. v. Berwick Industries, Inc.,* 373 F. Supp. 851, 868 (M.D. Pa. 1974), *aff'd,* 532 F.2d 330 (3d Cir. 1976); *Amerace Corp. v. USM Corp.,* 1975-1 Trade Cas. (CCH) ¶ 60,255 (N.D. Ill. 1975); *Ekco Products, Inc. v. Dare Plastics, Inc.,* 173 U.S.P.Q. 664, 665-66 (S.D. Ohio 1972); *Western Dairy Products, Inc. v. Griffith Laboratories, Inc.,* 175 U.S.P.Q. 680 (N.D. Cal. 1972); *Struthers Scientific & Int'l Corp. v. General Foods Corp.,* 334 F. Supp. 1329 (D. Del. 1971).

35 U.S.C. § 135; 37 C.F.R. § 1.201. Brunswick's attempts to change that *status quo* through the interference proceeding cannot have created any new injury within the limitations period.[7] In any event, there is much to be said for the observation of the court below that "you cannot start a suit, as Brunswick in effect did here, and then sue the defendant for refusing to default." (A-20)[8]

II. THE HOLDING OF THE COURT BELOW THAT BRUNSWICK HAS ALLEGED NO ANTITRUST INJURY FOLLOWED THE CONTROLLING PRINCIPLES OF THIS COURT'S DECISIONS.

Again without suggesting any meritorious basis for the invocation of this Court's discretion under Rule 19, Brunswick argues that the Seventh Circuit erred in declining to find an injury to competition in Brunswick's alleged loss of a patent monopoly, proceeding chiefly by referring to itself as a "competitor" and characterizing the decision below as holding that only ultimate consumers have antitrust standing. Brunswick's self-characterization disregards its concession below that it is not an actual or potential manufacturer of yarns and fabric in the rele-

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[7] Any alleged damages Brunswick may continue to sustain thus represents only " 'unabated inertial consequences of . . . pre-limitations action.' " *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1053 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983).

[8] Brunswick's position is not aided by characterizing Riegel's defense of its invention in the interference proceeding as "fraudulent." Under this Court's decisions, the consequence of such conduct, if proved, is the loss of first amendment immunity which would otherwise protect advocating a position before a tribunal, not the automatic creation of an antitrust violation. *See, e.g., Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Brunswick is still required to allege and show some exclusionary conduct in the relevant market within the limitations period, which it has not done.

vant market,[9] and its characterization of the holding below is simply incorrect.

The opinion below addresses consumer interests, but does so in light of this Court's oft-repeated admonition that the antitrust laws protect "*competition*, not *competitors*," and in explaining that competitors do have antitrust standing because they are "effective (maybe indispensable) surrogates" for consumers, an observation fully in accord with the decisions of this Court. (A-9-11) *See, e.g., Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 538 (1983). Moreover, the court's consumer-interest analysis was focused directly on demonstrating that Brunswick's claimed injury by its very nature does not involve any harm to competition. (A-9-11)

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), this Court held that a person injured by an act that violates the antitrust laws may recover *antitrust* damages only if the injury is to an interest protected by those laws. In *Brunswick*, the plaintiff's claimed injury—profits lost as a result of Brunswick's unlawfully acquiring and financing otherwise failing competitors—was not an antitrust injury because it was a loss of *the opportunity to profit from the lack of competition.*

> The damages [plaintiffs] obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for "the protection of *competition*, not *competitors*," *Brown Shoe Co. v.*

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[9] Thus, Brunswick urged that "it is of no significance that Brunswick is not in the business of manufacturing antistatic fabric using the process at issue. If its patent had not been stolen by Riegel, Brunswick could have engaged in the business of licensing the patent to Riegel and other textile manufacturers." (7th Cir. J. App. at 263) "Brunswick has been directly injured because its invention was stolen by Riegel and Brunswick was excluded from licensing that invention to anyone." (7th Cir. Reply Brief at 23)

> *United States*, 370 U.S., at 320. It is inimical to the purposes of these laws to award damages for the type of injury claimed here.

429 U.S. at 488.[10]

Brunswick argues that Riegel violated the antitrust laws and injured Brunswick by continuing to frustrate its alleged right to a patent, resulting in three elements of alleged damage:

> (1) lost royalties Brunswick would have been able to charge if it had a patent monopoly;
>
> (2) the costs Brunswick has incurred in attempting to obtain its patent through the interference; and
>
> (3) lost sales of metal fibers which Brunswick says it would have made through licensing its process.

The damages Brunswick seeks are no more than the profits it says it would have made if it were able to profit from the lack of competition afforded by a patent monopoly, and under the fundamental reasoning of the case that bears its name, Brunswick has no antitrust claim here.[11]

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[10] In *Associated General Contractors, supra*, this Court reaffirmed this principle of the *Brunswick* decision, incorporating it as an important element in the overall analysis of antitrust standing applied by the Court in that case. The opinion below implicitly considered the remaining factors suggested in *Associated General Contractors* but held, and properly so, that the controlling consideration was the absence of any injury to Brunswick under the antitrust laws. (A-9-13)

[11] The petition's references to alleged loss of metal fiber sales conceivably suggest a theory that direct injury to competing textile firms could produce an indirect antitrust injury to Brunswick through loss of those firms as potential customers. If Brunswick is suggesting such a theory as a ground for *certiorari*, its attempt is without merit. First, those claims would be barred by the statute of limitations in any event. Moreover, Brunswick has not alleged or shown any exclusionary enforcement of Riegel's patent against any such "other manufacturers." Further, as Riegel pointed out to the trial court, such "indirect supplier" claims would fail to meet any

If Brunswick's allegations of theft and fraud were true and timely, it might well have a valid claim under appropriate common-law principles. As the Seventh Circuit held, however, who as between competing claimants should be the holder of a patent is a matter of indifference to the purpose of the antitrust laws (A-11), and Brunswick's claims to the contrary do not justify review by this Court.

CONCLUSION

Respondent Riegel Textile Corporation respectfully submits that the petition should be denied.

Respectfully submitted,

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of the criteria enunciated by this Court in *Associated General Contractors, supra.* (7th Cir. J. App. at 186-90) Finally, Brunswick did not make such an argument before the Seventh Circuit on appeal, and cannot urge it now as a basis for *certiorari. United States v. Ortiz,* 422 U.S. 891, 898 (1975).

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REPLY BRIEF

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FOR THE SEVENTH CIRCUIT

REPLY BRIEF

The brief in opposition attempts to distinguish *Mt. Hood Stages, Inc. v. Greyhound Corporation,* 616 F.2d 394 (C.A. 9), cert. denied, 449 U.S. 831 (1980) and *Deltec, Inc. v . Laster,* 326 F.2d 443 (C.A. 6, 1964), but does not explain why their reasoning should not apply to this case. It also purports to "interpret" *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* 382 U.S. 172 (1965), but never faces up to the significance of the language discussed in the petition (pp. 22-23) as to patentees who commit fraud.

The narrow construction of *Walker* by respondent and the court below defeats *Walker's* teaching (as stated in the concurring opinion of Justice Harlan) that antitrust remedies should be "allowed room for full play" (382 U.S. at 180)

where deliberate fraud on the Patent Office is an element in the acquisition of a monopoly.

Respondent's treatment (p. 13) of the antitrust issue as "a matter of indifference to the purpose of the antitrust laws" reflects its basic position that it makes no difference whether a patent monopoly has been obtained lawfully by the true inventor or by one who secures and maintains a patent by fraud. This Court has not been so callous to the public interest.

1. The brief in opposition (pp. 2-3) refers to the statement of the Board of Interferences that the existence of fraud was known to Klein (Brunswick) prior to the declaration of interference. This assumed that Klein's knowledge of the "joint efforts" of Brunswick and Riegel to develop an antistatic fabric for hospital use was sufficient to put him on notice that Riegel was proceeding fraudulently. But neither he nor anyone else at Brunswick could have known at that time whether Riegel had made an independent discovery or invention. Indeed, the record shows (A59-61) that Brunswick did not obtain information with respect to Riegel's fraud in any usable form until 1980 and 1981, when it was finally able to obtain depositions in its case in chief in the interference proceeding from, *inter alia*, persons who had left Riegel's employ. In 1977 Brunswick had learned that Riegel's patent was based on information previously obtained from Brunswick, not on Riegel's independent development, but Brunswick "was unable to obtain any corroborating admissible testimony to support that suspicion" until it was able to depose the knowledgeable witnesses in 1980 and 1981. Compare A41-A43 with A59-61.* Thus, Brunswick

* Under the rules of the Patent Office, Riegel, as the junior party in the interference, had the right to take its testimony (which can be done only by deposition) first. Riegel prolonged the evidentiary process in every possible way, even coming to this Court after its petition for mandamus to prevent the production of documents had been denied by the Court of Customs and Patent Appeals. *Goodbar v. Banner*, 599 F.2d 431 (C.C.P.A.), cert. denied, 444 U.S. 927 (1979).

could not have submitted the "clear, unequivocal, and convincing evidence" necessary to support a charge of fraud (*Driscoll v. Cebalo,* 731 F.2 d 878, 884 (C.A.F.C. 1984)) until long after the interference proceeding had begun.

2. The Board of Interferences refused to decide whether Riegel had obtained its patent by fraud because the point was not raised during the period for filing a motion to dissolve an interference under the Patent Office rules, (37 C.F.R. 1.231). That would have required the issue to have been presented within the time specified in the notice of interference, that is, by August 6, 1975. But Brunswick could not have submitted such a motion by that time because, for the reasons stated above, it did not receive the necessary information until long afterwards. In addition, the Patent Office rules barred it from going beyond "official records and printed publications".*

Decisions of the Third Circuit and the Federal Circuit establish that charges of fraud can be presented to a board of interferences or a reviewing court even if they were not included in a timely motion. In *Standard Oil Co. v . Montedison,* S.p.A., 540 F.2d 611, 617 (C.A. 3, 1976), the Third Circuit, speaking through Judge Maris, held that, in a proceeding to review a board of interferences decision, the district court could:

> "permit an issue of fraud which affected the board's determination to be raised though it was not raised in the interference proceeding."

The underlying principle was that (*id.* at 616) "one who prosecutes an application for a patent must meet the highest

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* In 1975, 37 C.F.R. § 1.231 provided in part: "Such [a] motion based on facts . . . established by affidavits, declarations or other evidence outside of official records and printed publications will not normally be considered." See *In re Decision Dated Aug. 12, 1968,* 160 U.S.P.Q. 154 (Comm. Pat. 1968); *Collard v. Brown v. Busignies,* 99 U.S.P.Q. 188 (Comm. Pat. 1948); Wikstrom, *Patent Interference Practice,* § 8.01 at pp. 558-9 (1965).

standards of conduct in dealing with the Patent Office. . . . The circumstances surrounding such a proceeding must be wholly free from fraud and other inequitable conduct (citing decisions of this Court)". The district court should consider whether the party alleging fraud was acting in bad faith or grossly negligent,

> "or whether, on the other hand, the evidence of such fraud was not then reasonably available to him. . . . If after considering all relevant factors the court concludes that injustice to the parties and the public will otherwise result, it should permit the issue to be raised for the first time in the (review) proceeding." (*Id.* at 617.)

Subsequently, in *Driscoll v. Cebalo,* 731 F.2d 878 (C.A.F.C. 1984), the Federal Circuit made it plain that a claim of fraud or gross negligence supported by the evidence should be given effect even if belatedly raised.

For this reason, the Board's refusal to consider Brunswick's claim of fraud and its evidence submitted at final hearing was clearly wrong. That issue is presently before Judge Bua in the district court proceeding to review the Board's ruling, and is not before this Court on this petition. We have discussed the subject at some length in order to refute the suggestions in the brief in opposition that Brunswick knew that Riegel had obtained its patent fraudulently at a much earlier date and that the fraud issue was not before the Board.

3. Respondent contends that because the issue of fraud in interference proceedings has been characterized as "ancillary" to the issue of priority, the Board of Interferences (or reviewing court) does not possess primary authority to determine the existence of fraud. But priority must be denied if fraudulent misrepresentation is proved. This means that the question of fraud may be presented to the Board. The fact that an Interstate Commerce Commission order denying antitrust immunity was based on an applicant's misrepresentation to the Commission, as it was in part in the *Mt. Hood* case, would not mean that the Commission lacked authority to determine the

existence of fraud, or that the antitrust statute of limitations should not be tolled until after the ICC had determined that question. *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289 (1973), establishes that an antitrust action should be stayed even though only "some facets" of the case were pending before an administrative agency. See Petition, p. 13.

4. The question is not whether the Patent and Trademark Office (or courts reviewing its orders) has primary jurisdiction over *all* cases arising under the patent laws, which it does not, but whether it has such authority over questions of priority in interference proceedings, as it does under 35 U.S.C. § 135 (printed at A2). This authority extends to factors determinative of priority, which include the fraudulent nature of a party's claim.

5. Respondent argues that the holding in *Deltec, Inc . v. Laster,* 326 F.2d 443 (C.A. 6, 1964), has never been followed. This is incorrect. See *Miller v. Lucas,* 124 Cal. Reptr. 500, 51 Cal App.3d 774 (C.A. 1975). Until this case, no court has criticized *Deltec* or held to the contrary. *Deltec* dismissed an antitrust case as premature because of the pendency of an interference proceeding involving the inventorship of a patent where, as here the question of inventorship was essential to and dispositive of the antitrust claim. That the interference proceeding in *Deltec* was between two pending patent applications rather than between an application and an issued patent is irrelevant.*

6. The Patent Law Amendments Act of 1984 (cited at p. 12 of the petition and p. 8 of the brief in opposition) does not

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* "[A] proved intent . . ., by the litigation of baseless claims, to bar [competitors] from a market or to delay their entry should suffice for violation of the Sherman Act. The *Walker* decision holds as much. . . ." R. Bork, *The Antritrust Paradox,* (1978) at p. 354. Baseless claims can prolong a proceeding whether raised by a plaintiff or a defendant or, as here, by a party to an administrative proceeding.

moot the precedential significance of this case. The fact that in the future the new merged Board of Patent Appeals and Interferences has a broader jurisdiction than its predecessors does not mean that a similar question is less likely to occur. If the same kind of case arose, the problem would be the same. The question of tolling of limitations can also be important with respect to proceedings before other administrative agencies which have primary jurisdiction over issues essential to the resolution of related litigation.

7. Respondent urges that there was no continuing antitrust violation because there was no evidence of "enforcement" of the fraudulently obtained patent during the statutory period. But, as shown in our petition (pp. 22-23), "enforcement" by a fraudulent patentee need not be established.* What is important is "to appraise the exclusionary power of the illegal patent." *Walker Process,* 382 U.S. at 178. We agree, of course, that mere proof of fraud is not enough to prove either a Sherman Act violation *ab initio* or a continuing violation. But continued repetition of fraudulent representations by a patentee during the statutory period, combined with continuance of their anticompetitive effect in precluding the defrauded party from licensing others to use the patented process and depriving it of a market for its products (metal fibers), is sufficient to establish continuing use of monopoly power. As Professors Areeda and Turner have stated:

> "[The fraudulent procurement of a patent] can never make any contribution to competition on the merits. It can be condemned without risk of deterring legitimate competitive activity. Some market power can reasonably be inferred from it, because no one seeks a patent unless it confers, or is likely to confer, some market advantage." P. Areeda & D. Turner, *Antitrust Law,* Vol. III, 836b at 353.

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* None of the district court cases quoted in footnote 6 on page 9 of the brief in opposition is inconsistent with this interpretation of the *Walker* case.

8. Respondent concedes that the Sherman Act is designed to protect competitors as well as consumers, but criticizes our claim that Brunswick and its possible licensees or customers have suffered competitive damage from Riegel's misconduct. We did not assert that Brunswick was a direct competitor of Riegel in the sale of yarns and fabrics. But Brunswick was the principal potential competitor of Riegel for licensing the process covered by the patent here in issue. To assert that fraud which keeps the other primary competitor out of the market does not have an effect—indeed, a monopolistic effect—on competition is absurd. Depriving Brunswick of its markets for the process it invented is certainly the competitive type of injury "which the antitrust statute was intended to forestall." See *Associated General Contractors* and *Brunswick* cases cited on page 16 of the petition.

9. The same is true of Brunswick's claim that it could have sold metal fibers to competitors of Riegel if there had been any. Respondent argues (p. 12, n 11) that Brunswick's loss of metal fiber sales to other textile manufacturers who might have competed with Riegel cannot be deemed antitrust injury. But precluding such firms from competing with Riegel's monopoly is also the kind of effect the antitrust laws were designed to prevent.

Respondent's statement that Brunswick did not present this argument in the Court of Appeals is incorrect. Paragraphs 84, 117 and 149 of the Complaint (A47, 49, 50) alleged, almost *in haec verba:*

> "The effect of the unlawful acts and unlawful monopolization by Riegel has been to deprive Brunswick of a market for its metal fibers."

Brunswick's brief in the Court of Appeals stated:

(p. 4) "Brunswick could have granted licenses not only to Riegel, but also other textile manufacturers that might compete with Riegel. This would also have expanded the market for Brunswick's metal fibers.